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# SHAM MARRIAGES, ANCILLARY POWERS, AND MORAL DISCOURSE

*Toh Seok Kheng v. Huang Huiqun*;<sup>1</sup> *ADP v. ADQ*<sup>2</sup>

Is marriage an institution (of public morality) or a contract (of private ordering)? In *Toh Seok Kheng*, the High Court concluded that it was unable to declare a “sham marriage” void just because the motives behind the marriage seemed improper. In *ADP*, the High Court held that since a void marriage meant there was no marriage to begin with, the “wife” was not entitled to maintenance, and there could not have been any “matrimonial assets” to be divided, unless she had a strong “moral” claim. This piece considers how the aforementioned moral-contractual dichotomy emerges in these cases.

## I. CONTEXT

Is marriage an institution (of public morality) or a contract (of private ordering)? Marriages in Singapore have, perhaps, had both a contractual and moral dimension. The Women’s Charter<sup>3</sup> has had provisions dealing with void and voidable marriages,<sup>4</sup> and numerous (contractual) prescriptions on solemnization.<sup>5</sup> At the same time, it may be said that some of those very provisions actually impose certain moral conditions to marriage,<sup>6</sup> and there is also the venerable s. 46(1) that morally exhorts married couples to “be mutually bound to co-operate with each other in safeguarding the interests of the union and in caring and providing for the children.”<sup>7</sup> But, the concept of marriage as a moral institution and the concept of marriage as a mere private contract may sometimes conflict. Two recent cases illustrate this.

## II. *TOH SEOK KHENG*

M was the mother of the deceased, H, who had died intestate. W was a Chinese national. H had married W without telling his family of it, although he was close to them. After the marriage, H continued living with his family and not with W. When H suddenly died, W revealed she was H’s

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<sup>1</sup> [2011] 1 SLR 737 [*Toh Seok Kheng*].

<sup>2</sup> [2011] SGHC 60 [*ADP*].

<sup>3</sup> Cap. 353, 2009 Rev. Ed. Sing. [Women’s Charter].

<sup>4</sup> *Ibid.* at Part X, Chapter 3.

<sup>5</sup> *Ibid.* at Part III. See also Leong Wai Kum, *Elements of Family Law in Singapore*, (2007) at p. 3: “Marriage is formed by two willing adults contracting in compliance with the Women’s Charter’s prescriptions of its formation... That these are statutory prescriptions, however, should not blind us to the contract that underlies the formation.” [*Elements*].

<sup>6</sup> Monogamous marriages are prohibited (ss. 4 and 5); parties must be at least 18 years of age (s. 9); marriages within prohibited degree are void (s. 10); subsisting prior marriages must be avoided (s. 11); and parties cannot be of the same gender (s. 12). The preceding are the grounds in which a marriage may be found to be void (see s. 105). The other grounds are found in s. 3(4) (no marriage between two Muslims shall be solemnized under the Women’s Charter) and s. 22 (formal requirements of a valid solemnization) – the latter going to the so-called “formal validity”, rather than the “essential validity”, of a marriage.

<sup>7</sup> But see *Elements*, *supra* note 5 at p. 84: “Despite the fact that [s. 46] does not contain sanctions for its breach, it is powerful in conveying the ideal of the marital relationship. The law encourages the ideal and cajoles spouses towards it to the extent that is practicable.”

wife. H's family did not accept the legitimacy of the marriage. M sought a declaration that the marriage between H and W was a sham.

M argued that the marriage was a sham because: (1) the purpose behind the marriage was to facilitate an application for PR status for W; (2) even after the marriage, H had conducted his life as though he was a bachelor, and W was never introduced to the rest of his family; and (3) H had been compelled by W to enter into the marriage. Prakash J made the following pronouncements:

- (1) "Sham marriage" is not defined in statute or case law. The concept is a "corollary to the socially constructed idea of an "authentic marriage".<sup>8</sup>
- (2) "Sham marriage" is "not a term of art and does not create any legal implications in and of itself."<sup>9</sup>
- (3) That "marriage has a special moral status and involves established moral obligations is both commonly held and philosophically contentious."<sup>10</sup>
- (4) "As the idea of marriage as a contract achieves prominence, questions have been posed as to how far its obligations and the motives for entering into it can be amenable to individual choice. The contractual perspective of marriage implies that spouses can choose marital obligations to suit their interests, and can choose to get married for myriad reasons. To others, however, the good of marriage consists precisely in the restrictions it imposes on individual choice... the tension between the contractual and institutional perspectives of marriage upon which the concept of a sham marriage rests cannot be resolved by the courts."<sup>11</sup>
- (5) The "clear and settled" legal position is that the court cannot declare a marriage void on grounds other than those provided in s. 105 of the Women's Charter;<sup>12</sup> *Tan Ah Thee* was cited as authority.<sup>13</sup> Furthermore, those grounds "do not include annulling a marriage because it was entered into pursuant to motives which some might consider improper and may therefore render it a sham marriage in their eyes."<sup>14</sup>
- (6) The law "abstains from prescribing the "proper" motives for marriage and does not allow the spouses' private motives to undermine the validity of their marriage;<sup>15</sup> *Kwong Sin Hwa* was cited as authority.<sup>16</sup>
- (7) The prevention of the abuse of marriage impinges on the validity of marriage. This is a matter of "public policy and non-justiciable."<sup>17</sup> If there was a public policy to "exclude

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<sup>8</sup> *Toh Seok Kheng*, *supra* note 1 at para. 10.

<sup>9</sup> *Ibid.* at para. 17.

<sup>10</sup> *Ibid.* at para. 10.

<sup>11</sup> *Ibid.* at para. 11.

<sup>12</sup> "A marriage which takes place after 1st June 1981 shall be void on the following grounds only: (a) that it is not a valid marriage by virtue of sections 3(4), 5, 9, 10, 11, 12 and 22; or (b) where the marriage was celebrated outside Singapore, that the marriage is invalid — (i) for lack of capacity; or (ii) by the law of the place in which it was celebrated." See *supra* note 6.

<sup>13</sup> *Tan Ah Thee v. Lim Soo Foong* [2009] 3 SLR(R) 957 [*Tan Ah Thee*].

<sup>14</sup> *Toh Seok Kheng*, *supra* note 1 at para. 12. See also *ibid.* at para. 55: "It may be argued that, unlike the argument regarding a lack of valid consent which was a ground expressly provided for under s 106 of the Charter, marriage for improper motives is not dealt with in the Charter. This does not mean, however, that the exclusivity of s 105 can be disregarded."

<sup>15</sup> *Toh Seok Kheng*, *supra* note 1 at para. 13.

<sup>16</sup> *Kwong Sin Hwa v. Lau Lee Yen* [1993] 1 SLR(R) 90 [*Kwong Sin Hwa*].

<sup>17</sup> *Toh Seok Kheng*, *supra* note 1 at para. 14.

persons from the rights they are entitled to on the basis of their marriage on the premise that their marriage is perceived as not authentic because it does not correspond to an assumed pattern of an authentic marriage, that public policy is properly reserved to Parliament for articulation, delineation and enactment.”<sup>18</sup>

- (8) Cases involving convictions for corruption for entering into “sham marriages”<sup>19</sup> are irrelevant because they do not deal with the validity of a marriage, “which must be determined solely according to the [Women’s] Charter’s precepts”, and they did not hold that sham marriages offend against general public policy.<sup>20</sup>

### III. ADP

P and R married in Hong Kong in 1995. P was previously married to E in Japan in 1989. The latter marriage had broken down by the time P and R married. P was informed by E that the Japanese marriage had dissolved around June 1995, but this proved to be inaccurate as under Japanese law, the divorce was to be finalised only in December 1995. So P was still married to E when she married R, and the Hong Kong marriage was void because Hong Kong law did not permit bigamy.<sup>21</sup> P and R only knew about this mistake amidst their own divorce proceedings. The Family Court declared the Hong Kong marriage void, thus the remaining matters were P’s claim for maintenance, and for a division of the “matrimonial assets.” Kan J noted that both s. 112(1)<sup>22</sup> and s. 113<sup>23</sup> of the Women’s Charter referred to the court’s power to order a division of matrimonial assets and also to order a man to pay maintenance even in the context of a nullity of marriage. Further noting that a nullity of marriage encompassed the two distinct concepts of void and voidable marriages,<sup>24</sup> he said the following:

- (1) “A void marriage is one which, owing to the presence of an impediment at the time of the ceremony, will be regarded by every court in any case in which the existence of the marriage is in issue as never having taken place and can be so treated by both parties to it without the necessity of any decree annulling it”.<sup>25</sup>
- (2) “It is noted by Professor Leong Wai Kum that there is no case that determined whether the exercise of the court’s powers under s 112 and s 113 should be attenuated where a marriage is void... there is also nothing in the official record of the parliamentary debates”.<sup>26</sup>

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<sup>18</sup> *Ibid.* at para. 15.

<sup>19</sup> E.g., *PP v. Ng Ai Hong* [2007] SGDC 68. See also *PP v. Wei Xiaozhen* [2010] SGDC 320.

<sup>20</sup> *Toh Seok Kheng*, *supra* note 1 at paras. 15–17.

<sup>21</sup> *ADP*, *supra* note 2 at para. 3.

<sup>22</sup> “The court shall have power, when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage, to order the division between the parties of any matrimonial asset or the sale of any such asset and the division between the parties of the proceeds of the sale of any such asset in such proportions as the court thinks just and equitable.”

<sup>23</sup> “The court may order a man to pay maintenance to his wife or former wife —

(a) during the course of any matrimonial proceedings; or

(b) when granting or subsequent to the grant of a judgment of divorce, judicial separation or nullity of marriage.”

<sup>24</sup> *Ibid.* at para. 8.

<sup>25</sup> *Ibid.* at para. 10. D. Tolstoy, “Void and Voidable Marriages” (1964) 27 MLR 385 at pp. 385–386 was cited.

<sup>26</sup> *Ibid.* at para. 13.

- (3) “A marriage can be rendered void for different reasons... A party may have acted in good faith out of ignorance or that party may have acted with full knowledge of the impediment and with the intention to deceive the legal authorities and the other party... the nullity of the marriage ought to have different effects according to the facts... an innocent party may be accorded rights and liabilities as though the marriage was legal, and a “guilty” party may be denied of any rights, and be subject to the liabilities... there will be many variations to the facts which require the different treatments, and legal, sociological and public policy considerations will have to be taken into account. [But it] is not appropriate for a court to extrapolate an answer”.<sup>27</sup>
- (4) “Section 112(1) [of the Women’s Charter] states that the court shall have the power to order a division of *matrimonial* assets. [Since] a void marriage is not a marriage, the parties were not in a state of matrimony and there can be no matrimonial assets to be divided.”<sup>28</sup>
- (5) “Similarly, when s 113 [of the Women’s Charter] states that a court may order a man to pay maintenance to his *wife* or *former wife*, that is predicated on the claimant being one or the other. In the case of a void marriage, the claimant is neither... A ‘wife’ who is unaware of the impediment would have a moral claim for maintenance, but a ‘wife’ who suppressed the impediment so as to deceive the other party and the marriage authorities would have a weak claim.”<sup>29</sup>

#### IV. SOME COMMENTS

As will be seen, the moral-contractual dichotomy in the conceptualisation of marriage emerges as a theme when we compare the two cases, which will be discussed *in seriatim*.

At the outset, it should be noted that *Toh Seok Kheng* was preceded by *Tan Ah Thee*. There, T was married to K and had six children during the marriage. During this marriage, T had a relationship with D and a son was born. D and her son moved into T’s home and (allegedly) “systematically took control” of the property of T (by manipulating T and his will) and excluded K and her children.<sup>30</sup> It was thus alleged that the marriage between T and D “ought to be found void for being a sham marriage against public policy as [D’s] sole or predominant motive in registering the marriage was to revoke [T’s] will.”<sup>31</sup> Prakash J held that since the Women’s Charter represents a complete code, a marriage cannot be declared void on any other ground not provided for in s. 105 of the Women’s Charter, and improper motives are not expressly provided for in s. 105, the argument on sham marriage must fail.<sup>32</sup> Local commentators described *Tan Ah Thee* as having “done well in clarifying the law on void and voidable marriages”<sup>33</sup> and “correct in that s. 105 must be read as it was written.”<sup>34</sup> Insofar as *Toh Seok Kheng* involved the argument that a marriage can be rendered void on grounds not found in s. 105,<sup>35</sup> the dust had settled even

<sup>27</sup> *Ibid.* at paras. 14–15.

<sup>28</sup> *Ibid.* at para. 15 [emphasis in original].

<sup>29</sup> *Ibid.* at para. 16 [emphasis in original].

<sup>30</sup> *Tan Ah Thee*, *supra* 13 at paras. 5–6.

<sup>31</sup> *Ibid.* at para. 10.

<sup>32</sup> *Tan Ah Thee*, *supra* 13 at paras. 19 and 51.

<sup>33</sup> Debbie Ong and Valerie Then, *Family Law Annual Review of Singapore Cases* (10, 2009) at para. 15.17.

<sup>34</sup> Leong Wai Kum, “Clarity in the Law of Valid, Void and Voidable Non-Muslim Marriages”, [2009] 21 S.Ac.L.J. 575 at para. 21 [Clarity in the Law].

<sup>35</sup> *Toh Seok Kheng*, *supra* note 1 at para. 4.

before the case began. Yet what seems striking and unresolved, however, is an aversion from all quarters to discussing the other issues/problems (moral or otherwise) surrounding sham marriages. *An important caveat is thus in order at this point:* I am *not* contesting that the words of s. 105 permit the reading in of additional grounds to make a marriage void. I am advocating, instead, alternative normative viewpoints for consideration – viewpoints that either the legislature or the judiciary would hopefully engage in future when dealing with sham marriages.

To begin with, whilst it is true that a writ for divorce cannot be filed unless three years have passed since the date of the marriage,<sup>36</sup> and that this bar “was to ensure that the newly married invest enough time and effort into their relationship before jumping ship”,<sup>37</sup> there have been increasing calls (in tandem with trends in other jurisdictions) to shorten the prohibition period.<sup>38</sup> If preventing/identifying sham marriages was already difficult enough, then shortening the prohibition period will make it even easier for sham marriages to be formed and quickly dissolved when convenient.<sup>39</sup> Indeed, it is not uncommon to hear of foreigners getting “married” to local citizens – provided some kind of fee is paid – as a (usual) pretext for gaining just a couple of additional years of (relatively) lucrative employment in Singapore.<sup>40</sup> Of course, if we consider sham marriages to mostly take this form,<sup>41</sup> it may be countered that such issues are better dealt with (and already are dealt with) by the relevant executive agencies such as the Immigration and Checkpoints Authority (“ICA”). The ICA possesses the necessary expertise to combat this scourge more efficiently (either through executive or judicial means), and this obviates the courts’ direct involvement. Alternatively, there is the option of prosecuting parties contracted to sham marriages with related crimes such as corruption<sup>42</sup> – as was pointed out in *Toh Seok Kheng* itself.<sup>43</sup>

But neither of these counter-points countenance the logically prior question of what constitutes a sham marriage. That is, how can a person be guilty of an offence *as a result* of contracting into a sham marriage when there is no operative definition of a sham marriage (or a marriage for the matter)?<sup>44</sup> If this is really a question that only Parliament can address and not the courts, this argument may not necessarily be convincing. Parliament has never in any statute defined moral issues such as this with the sort of pinpoint precision yearned for and required here.<sup>45</sup> Likewise, if it is difficult for the courts to categorically exclude grounds for marriages (especially “grey” areas such as getting married to reap a financial benefit in the form of public housing, or a person marrying another only for the money/inheritance), it is no less difficult for Parliament to do so – in fact is it not more often that Parliament drafts broad laws that afford judicial latitude to fill in the gaps?

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<sup>36</sup> Women’s Charter, *supra* note 3, s. 94(1).

<sup>37</sup> *Elements*, *supra* note 5 at p. 146.

<sup>38</sup> *Ibid.* at p. 148. See also Debbie Ong, “Time restriction on divorce in Singapore” [2003] S.J.L.S. 418.

<sup>39</sup> On the flipside, if the prohibition period is too long, it may be argued that this induces an unhappy partner to find other means to terminate the marriage (*e.g.* using one of the grounds in s. 105 or s. 106, neither of which require a three-year bar).

<sup>40</sup> See *e.g.*, Crystal Chan, “Sham marriage ring exposed”, *The New Paper*, 14 June 2010. See also *PP v. Wei Xiaozhen* [2010] SGDC 320; and *PP v. Zhou Xiuqing* [2010] SGDC 429.

<sup>41</sup> The other problematic form arguably being “mail-order brides”.

<sup>42</sup> It is noteworthy too that our corruption laws are framed quite broadly.

<sup>43</sup> *Toh Seok Kheng*, *supra* note 1 at para. 15.

<sup>44</sup> See *Elements*, *supra* note 5 at p. 1.

<sup>45</sup> Ironically, the closest it has come well may be the Women’s Charter.

To be clear, what is suggested here is not prying unnecessarily into the private intentions of parties who marry,<sup>46</sup> but *prohibiting clearly egregious conduct* that abuses loopholes in the law. As it stands there are already distilled moral constraints in the form of some of the grounds that will make a marriage void.<sup>47</sup> Apart from saying that the s. 105 grounds are exhaustive, do we really think there should be no other (moral) impediments worth considering? And, from a practical perspective, the court is already used to examining the intricate details of family law disputes, such as when it is called upon to exercise its discretion when deciding issues of custody. Determining whether a marriage was entered into with an *obviously collateral purpose* is probably no bigger a challenge. Nor should we too readily embrace the argument of ensuring the courts are not made to engage so-called complex policy discourse – there are plenty of local cases, albeit not necessarily in family law contexts, that suggest otherwise.<sup>48</sup> And if indeed marriages are nothing more than contracts (with statutory requirements), and if indeed policy discussion is so complex, why then have our courts declared that although married couples may choose how to regulate their lives, they are not permitted to agree to negate the marriage or resile from the marriage – *i.e.* make agreements pursuant to the marriage that are against public policy?<sup>49</sup>

Next, it has been said that a “void marriage is a somewhat vacuous term that conveys the relative absence of a marital relationship between the two persons who attempted to form a marriage.”<sup>50</sup> It is noteworthy that this contrast of concepts is predicated on an arguably extra-statutory and moral claim:

A void marriage refers to the situation where two persons undergo what they thought would result in marriage but which, because they failed to comply with a critical statutory prescription of its formation, did not succeed...

The term void marriage is, however, inappropriate to refer to a situation which is different in being a complete non-starter. For example, imagine a perfect stranger walks up to me at the bus-stop and claims that the two of us are parties to a void marriage because we have failed to comply with the Women’s Charter prescriptions of formation of marriage. I should not have to agree to being in this ‘status’ with him since being in this status exposes me to the threat of being made a party to an application by him for a judgment of nullity... Instead I should be able to retort that we have nothing whatsoever and, if this needs to be conveyed a term, we have a ‘non-marriage.’<sup>51</sup>

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<sup>46</sup> Cf. the Ontario Supreme Court case of *Asser v. Peermohamed* 12 DLR (4<sup>th</sup>) 475 at paras. 12–13: “Romance, as a spur to marriage, is a rather modern phenomenon, and limited at that; passionate love is not an essential element of the marriage status, though a welcome one. A marriage is not vitiated because a party is motivated into embracing this status by considerations extraneous to love; indeed, most marriages are entered into with a certain degree of practical reasons, and sometimes these reasons are predominant ones: for example, one does marry to please one’s parents or to avoid conscription in the army.”

<sup>47</sup> That is, the statutory proscriptions on capacity are basic and irreducible moral attributes of marriages in proper civilisations, such as prohibiting pedophilia and incest.

<sup>48</sup> See *e.g.*, the Court of Appeal’s decisions in *City Developments Ltd v. Chief Assessor* [2008] 4 SLR(R) 150 at para. 11; *RSP Architects Planners & Engineers v. MCST Plan No 1075* [1999] 2 SLR(R) 134 at para. 43; *Xpress Print Pte Ltd v. Monocrafts Pte Ltd* [2000] 2 SLR(R) 614 at para. 48; and *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 at para. 36.

<sup>49</sup> See *e.g.*, the Court of Appeal decision in *Kwong Sin Hwa*, *supra* note 16 at para. 38.

<sup>50</sup> *Elements*, *supra* note 5 at p. 46.

<sup>51</sup> *Ibid.* at p. 40.

That a void marriage should not be equated with a non-marriage is analogous to why a sham marriage should not be a marriage: it simply is not morally right – like how one should not be burdened with a stranger’s baseless allegation of a void marriage, society should not be handicapped by ulterior declarations of marriages. Marriages contracted purely for collateral purposes, if so easily endorsed as legally permissible, undermine our legal system by displacing the moral confidence of the public invested in it. Moreover, there is an irony inherent in the distinction drawn between void marriages and non-marriages. The irony lies in the claim that “where the persons have formed the underlying fundamental contract of marriage (by evincing a common intention to marry each other) they become entitled to the status of parties to a void marriage where their marriage is void because of their failure to comply with... the statutory prescriptions”.<sup>52</sup> Two parties genuinely in a union for a long time would probably care little if their marriage was considered void or non-existent – the overpowering grief emanates from none other than the special moral status accorded to the institution of marriage.<sup>53</sup>

More and more common law jurisdictions, such as the UK<sup>54</sup> and Canada,<sup>55</sup> have turned away from invalidating sham marriages as non-marriages, yet is this necessarily a good thing that we should emulate? It seems all these trends of deregulating marriages and characterising them purely as contracts will eventually defeat the purpose of even (statutorily or judicially) regulating marriage in the first place. How far should we take the argument that marriage should (and possibly would) eventually be nothing more than a contract between two individuals?<sup>56</sup> But then there remains the objection of uncertainty, an objection ultimately also motivated by contractual concerns. As has been opined:

It is crucial that there be certainty as to when a solemnisation of marriage is successful or, in the alternative, is a nullity. The premise is that only failure of compliance with, first, the statutory requirements of the process of solemnisation, or second, the statutory requirements of the parties possessing capacity to marry, renders the solemnisation invalid. Where two people have complied with the statutory requirements of the process of solemnisation and possess capacity to marry one another, they have a valid marriage. It cannot possibly be right that someone can allege, using a ground other than these, that is nevertheless invalid.<sup>57</sup>

With respect, the argument on certainty lends itself to some counter-arguments, and we can look to *ADP* at this point. Despite the clear statutory language of the Women’s Charter that gives a court the power to provide ancillary relief even in nullified marriages, the court decided there that the definitional obstacle posed by a void marriage (*i.e.* a void marriage by definition means there was no marriage to begin with) meant that a petitioner seeking ancillary relief pursuant to a

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<sup>52</sup> *Ibid.* at p. 47.

<sup>53</sup> See also *ibid.* at pp. 41–44.

<sup>54</sup> See *e.g.*, the House of Lords decisions in *Vervaeke (formerly Messina) v. Smith* R [1983] AC 145; and (*On the application of Baijai and others*) v Secretary of State for the Home Department [2008] UKHL 53.

<sup>55</sup> *Supra*, note 46.

<sup>56</sup> As will be discussed, there are quite a number of provisions in the Women’s Charter that actually militate against such a conception.

<sup>57</sup> Clarity in the Law, *supra* note 34 at para. 21. See also para. 49: “The law ought to be clear. It is unacceptable that two people who have solemnized a marriage in compliance with the critical requirements of the statute should be left in any doubt as to whether they have a valid marriage.”



void marriage should *prima facie* be entitled to neither maintenance nor a division of the matrimonial assets. Certainty was not given the highest priority: such a petitioner, looking at the Women's Charter, would have expected *some* maintenance and/or a division of the matrimonial assets, as opposed to getting, in the usual course of events, probably nothing. The court preferred to look beyond what the statute said, and concluded that whether such a party would get something would essentially depend on the strength of her moral claim (although the court did say the contours of this moral claim may perhaps be better delineated by Parliament).<sup>58</sup> In the same way that the distinction between a non-marriage and void marriage is drawn so that a stranger cannot simply accost me and put the onus on me to disprove a unilateral claim of marriage,<sup>59</sup> a *de facto* stranger involved in a sham marriage should not, upon the termination of the marriage, be able to point to the Women's Charter and expect to get maintenance or a cut of the divisible matrimonial assets. And all this is without first mentioning that if indeed marriage under the Women's Charter is simply nothing more than complying with the statutory requirements and evincing a "mutual exchange of intention to marry",<sup>60</sup> this begs the question of whether two parties to a sham marriage could have evinced an intention to "marry", since it is far from settled that marriage has a singular definition.<sup>61</sup>

In this connection, *ADP* is also a timely reminder of the moral authority invested in our courts; an authority, perhaps, that ultimately stems from the understanding of our courts as guardians of our society's moral fabric. It must be that this authority applies equally to family law matters, and arises both expressly and (it is submitted) impliedly. Having surveyed the provisions on void marriages,<sup>62</sup> now consider another set of provisions in the Women's Charter dealing with the court's powers, some of which were already alluded to in *ADP*:

- (1) The court has the power to order maintenance of the wife, and vary or rescind any such order.<sup>63</sup>
- (2) The court has the power to order maintenance of the former wife, and vary or rescind any such order.<sup>64</sup>
- (3) The court has the power, when granting or subsequent to granting a divorce, judicial separation or nullity of marriage, to order the division of matrimonial assets in such proportions it thinks just and equitable.<sup>65</sup>
- (4) The court has the power to make, vary, or rescind an order related to custody-related matters.<sup>66</sup>
- (5) The court retains unfettered discretion to overrule any contract or agreement (whether made before or after a marriage) drawn up between parties *vis-à-vis* maintenance, division of matrimonial assets, or custody-related matters.<sup>67</sup>

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<sup>58</sup> *ADP*, *supra* note 2 at paras. 14–15.

<sup>59</sup> See *Elements*, *supra* note 5 at p. 41: "The claim of a perfect stranger who accosts me at the bus-stop that we are married persons fails abjectly, and must fail abjectly, because there is no credible evidence that he can produce that we formed the fundamental contract of marriage".

<sup>60</sup> *Ibid.*

<sup>61</sup> *Ibid.* at p. 1.

<sup>62</sup> *Supra*, note 6.

<sup>63</sup> Women's Charter, *supra* note 3, Part VIII.

<sup>64</sup> *Ibid.* at Part X, Chapter 4.

<sup>65</sup> *Ibid.* at s. 112.

<sup>66</sup> *Ibid.* at Part X, Chapter 5.

<sup>67</sup> See the seminal Court of Appeal decision in *TQ v. TR* [2009] 2 SLR(R) 961 at paras. 57–106.

If we adopt a literal approach to statutory interpretation, the court has the power to do all of the above *only* because of the express powers conferred by the Women's Charter. But unless a statute categorically precludes the court from acting a certain way, the court may well be able to do certain things as a result of either reading the statute more purposefully, or deriving the basis for certain inherent powers from some form of written law. Regarding the point on purposive interpretation, Kan J in *ADP* has already noted the lack of legislative history *vis-à-vis* the specific question of whether court's powers when making orders in the context of nullified marriages are attenuated;<sup>68</sup> regarding whether the legislative history permits extending grounds of voiding marriages beyond those found beyond s. 105, the position is not crystal-clear,<sup>69</sup> but the exact language of s. 105 quite categorically rules out any other ground for making a marriage void.<sup>70</sup> The upshot is that we may have to pitch the endeavour (of justifying why a sham marriage should be void) at a higher level of abstraction and consider the general tenor and purpose of the Women's Charter. It is perhaps not fanciful to suggest that the Women's Charter is ultimately about protecting the rights of women and children – and a wide spectrum at that. Such protection, it seems, must be motivated by a recognition of the importance of families in Singapore. If so, upholding sham marriages as valid marriages (even if done indirectly) serves neither of those two broad purposes. As for the point about the court's inherent powers, it is accepted that there is no clear touchstone as to when a court should exercise it,<sup>71</sup> and this is sensible because if such powers are interpreted expansively, it is pointless to have any statute or case precedent.<sup>72</sup> So this point is a little tentative, but remains food for thought – especially if one considers that if a party somehow manages to have proceedings brought about by the “guilty” party to a sham marriage struck out under O 18 r 19(1) of the Rules of Court,<sup>73</sup> the *practical result* is the same if the marriage is found void and (applying *ADP*) no maintenance or division of matrimonial assets is ordered.

Finally, it is submitted that it may be difficult to read both *Toh Seok Kheng* and *ADP* harmoniously if a restrictive reading of the Women's Charter is adopted, in that the latter clearly suggests that the court can look beyond what is expressly provided for in the Women's Charter, something that the former was very apprehensive to do. The resulting tension is, however, only another instance of the (unresolved) moral-contractual dichotomy in our family law jurisprudence. It is also not readily apparent, as a matter of principle, as to why (extra-statutory) moral considerations cannot feature when determining if a marriage is a nullity (*i.e.* issues of formation), but can feature in a void marriage when a “former wife” claims maintenance or a portion of the “matrimonial assets” (*i.e.* ancillary proceedings). It is hard to square how a contract (marriage) found *ab initio* by a court may be effectively enforced indirectly if a claim for maintenance or a portion of the matrimonial assets succeeds.

## V. CONCLUSION

It is accepted that there are some fundamental hurdles to be cleared if one argues that the court has the power to declare that a marriage is a sham (or whatever other name it chooses). But I

<sup>68</sup> *ADP*, *supra* note 2 at para. 13.

<sup>69</sup> *Tan Ah Thee*, *supra* 13 at paras. 35–43.

<sup>70</sup> *Cf. ibid.* para. 37.

<sup>71</sup> See Goh Yihan, “The Jurisdiction to Reopen Criminal Cases: A Consideration of the (Criminal) Statutory and Inherent Jurisdiction of the Singapore Court of Appeal” [2008] S.J.L.S. 395 at 403–404.

<sup>72</sup> See also *Tan Ah Thee*, *supra* 13 at paras. 15–18.

<sup>73</sup> Cap. 322, R 5, 2006 Rev. Ed..

have tried presenting alternative viewpoints demonstrating the discomfort with the plain notion that a marriage is valid as long as the requirements in the Women's Charter are satisfied (*i.e.* our conceptualisation of marriage). Hopefully some of these issues can be engaged in due course.